Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

CLIFFORD HOTTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition raises three interrelated questions.

First, when will a "finding of fact" that holds the potential to substantially increase the punishment that a defendant may be subjected to, be deemed to constitute an "element" of the offense which must be found beyond a reasonable doubt by a jury.

Second, if the "factual finding" is deemed to be a "sentencing factor" rather than an "element"of the offense, what procedures and standards are nonetheless constitutionally mandated when such a "sentencing factor" can operate to substantially increase a defendant's sentence over the "base" offense level for the crime tried to the petit jury.

Third, in an instance where a factual finding genuinely holds the potential to significantly increase a defendant's sentence, is there a rational basis, and/or a constitutionally permissible basis, to distinguish between the process that must be afforded a defendant regardless of whether the enhancement is deemed to be an "element" or a "sentencing factor."

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The Petitioner, Dr. Clifford E. Hotte, respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Second Circuit in this proceeding.

OPINION BELOW

The Second Circuit Court of Appeals issued its original judgement and opinion on August 20, 1999. The opinion is reported at 1999 U.S. App. LEXIS 20142 (2nd Cir. 1999). It is reprinted in the Appendix hereto (A. 1a-10a). On November 5, 1999 the Second Circuit Court of Appeals denied Petitioner's petition for panel rehearing and rehearing *en banc*. The unpublished judgment of the District Court for the Eastern District of New York, dated November 16, 1998, is reprinted in the Appendix hereto (B. 11a-13a). The Order denying the petition for rehearing and rehearing *en banc* is reprinted in the Appendix hereto (C. 14a-15a).

STATEMENT OF JURISDICTION

The Second Circuit Court of Appeals issued its judgement and opinion on August 20, 1999. It denied Petitioner's petition for panel rehearing and rehearing *en banc* on November 5, 1999. This Petition has been filled within 90 days of the date of the denial of the Petition for Rehearing. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND UNITED STATES SENTENCING GUIDELINES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution provides in relevant part that; "In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation . . . against him . . . and to have the Assistance of Counsel for his defense."

The provisions of the securities fraud statute, 15 U.S.C. §§ 78j(b) and the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343 respectively, are more fully set forth in the Appendix at (D. 17a - 19a)

The provisions of the United States Sentencing Guidelines ("USSG") section 2F1.1 is more fully set forth in the Appendix (D. 19a-20a). Application note USSG § 2F1.1, comment, (n.9) provides in relevant part: "For the purposes of subsection (b)(1), the loss need not be calculated with precision. The court need only make a reasonable estimate of the loss, given the information available."

The "commentary" to USSG § 6A1.3 provides in pertinent part that: "The Commission believes that the use of the preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

STATEMENT OF THE CASE

The Petitioner, Dr. Clifford E. Hotte, was indicted for securities fraud in connection with Health Management, Inc., a "small cap" public company engaged in the sale of pharmaceuticals that the Petitioner had founded in 1985. The first trial of the Petitioner commenced in December of 1997, but resulted in a hung jury. On April 6, 1998 the case was tried for a second time and the government was ultimately able to obtain a conviction. Following Petitioner's conviction, the United States Department of Probation prepared a Pre-Sentence Report (PSR) to which Petitioner's counsel made timely and detailed objections. On November 16, 1998 the Petitioner was sentenced by the Hon. Sterling Johnson Jr. (USDJ, E.D.N.Y.)

The record below reveals that at the time of the sentence, the District Court was presented with the following factual circumstances. The defendant was a 51 year old first time non-violent offender, whom it had taken the government two trials to convict. Dr. Hotte had not only led a blameless life up until

his indictment and subsequent conviction, but as the PSR confirmed, he was a dedicated family man and had enjoyed a distinguished academic career in radio pharmacology[1] before founding the corporation, HMI, Inc., in 1985.

At the time of the Petitioner's sentencing the government argued that Dr. Hotte's base offense level of 6 should be "enhanced" by adding an additional 25 points. Since Dr. Hotte's Criminal History Category was I — had the base offense level been applied, the guidelines would have called for a sentencing range of 0 to 6 months. By applying 25 points in "enhancements" the District Court raised Petitioner's offense level to 31, placing Petitioner in a guideline category which called for a minimum sentence of imprisonment of 9 years and a maximum of 11¼ years.[2]

At the sentencing proceeding — following brief oral argument by the parties (the court would only permit each side to argue for five minutes)[3] — the District Court granted the

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1. Prior to founding HMI, Inc., Dr. Hotte had held dual teaching appointments as a professor in radio pharmaceutical science at Tufts Medical School and Northeastern University, he subsequently joined the faculty at the Stony Brook School of Medicine and served as the Director of the nuclear pharmacy at the University Hospital and Medical Center, State University at Stony Brook, New York.

2. The government sought the following enhancements of the Petitioner's base offense level: (1) 2 points because the government asserted that the "fraudulent scheme involved more than minimal planning," [USSG § 2F1.1(b)(2)(A)] (2) 4 points because the government asserted that the Petitioner "directed the activities of at least five individuals at HMI," [USSG § 3B1.1(A)] (3) 2 points because the government asserted that the Petitioner "abused a position of public trust as President and CEO of HMI," [USSG § 3B1.3] and (4) 17 points because the government asserted that the "amount of loss resulting from the instant offense [was] at least $60 million." [USSG § 2F1.1(b)(1)(R)].

3. The District Court began the sentencing proceeding by informing counsel; "I will give you [counsel for each side] five minutes apiece to argue your positions." Moreover, and as the record of the

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government's application for the full 25 point increase and sentenced the Petitioner to a term of imprisonment of 9 years, a fine of $250,000 dollars, restitution in the amount of $9,571,429.00 and a $700 special assessment.

The largest "enhancement" sought by the government was a 17 point enhancement based upon the government's "theory of the loss" purportedly caused by Petitioner's conduct. Although the government bore the burden of proving the basis for all enhancements which they sought — and in particular proving the amount of the alleged "loss" purportedly caused by the Petitioner's conduct — it offered no witnesses, proffered no expert testimony, no documents, indeed no evidence of any kind at sentencing hearing. The only information provided by the government were two letters in which it argued its loss calculation methodology. Neither letter addressed any of the other sentencing enhancements sought. In several submissions

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sentencing preceding confirms, the District Court made no factual findings in connection with any of the enhancements that it imposed. The Court made no factual findings in connection with any of the enhancements that it imposed. The Court made no factual findings in connection with the 2 point enhancement it applied on the basis of an "abuse of trust." (*See United States v. White*, __ F.3d __, 1999 U.S. App. LEXIS 4235 [2d Cir. 1999]; "Because the District Court did not make the factual findings necessary to support the abuse of trust enhancement, we vacate the sentence and remand for re-sentencing."). The Court made no factual findings in support of its enhancement of 4 points because the petitioner allegedly "directed the activities of at least five individuals within HMI." (*See United States v. Patasnik*, 89 F.3d 63, 68-69 [2d Cir. 1996] quoting *United States v. Greenfield*, 44 F.3d 1141, 1147 n.4 [2d Cir. 1995]; "We have repeatedly stressed that a sentencing court must make specific factual findings in support of any offense-role enhancement.") The Court similarly made no factual findings in support of the 2 point enhancement for "more than minimal planning." (*See United States v. Smith, supra*, at 59, quoting *United States v. Reed*, 49 F.3d 895, 901 [2d Cir. 1995]; "As we have stressed repeatedly, 'factual findings must be made with sufficient clarity to permit appellate review.' ")

made prior to the sentencing proceeding, Petitioner's trial counsel vigorously contested both the methodology and the amount set forth in the prosecution's loss calculation.

Dr. Hotte was convicted of participating in a conspiracy with seven officers and employees of HMI, Inc. (all of whom received full immunity in exchange for their testimony against the Petitioner), to overstate the assets of the company by claiming that the company owned additional "inventory-in-transit" which had not been counted by the accountants at fiscal year end 1995. At the time of these events however, HMI, Inc., was entirely solvent with assets of well over 9 million dollars. It was the prosecution's theory of the case that the conspirators agreed do this so that the company would report 4th quarter earnings that would meet the projected earning figures for HMI that had been forecast by several Wall Street analysts who were "following" the stock.

When these "inventory irregularities" ultimately came to light, the Board of HMI engaged outside counsel to investigate. While it was certainly appropriate for the directors of HMI to pursue such an investigation, the facts developed at trial disclosed that the directors and officers spearheading the investigation had a very real dual agenda. HMI was a highly regarded company and particularly well positioned in its field. The outside directors saw the investigation as a unique opportunity to divest Dr. Hotte of control of the company he had founded and built, and to take over HMI for themselves. And, as the record confirms, that is exactly what they did. Not only did the directors force Dr. Hotte's removal, but they then hired outside counsel consisting of several former federal prosecutors and a former SEC representative and directed them to approach the Securities and Exchange Commission and the United States Attorney's Office and to engineer a deal whereby all culpable parties would receive immunity (as well as the corporation itself) in exchange for testifying against Dr. Hotte.

Once in control of the company, and with Dr. Hotte under investigation by the SEC and the United States Attorney's Office, the new management immediately moved the company from New York to Chicago. With Dr. Hotte removed as the Chairman and CEO, their first order of business was to vote themselves handsome salary increases and large stock options. Further, they hired experts to advise them on so-called "poison-pill" anti-takeover plans to protect their newly acquired company. Nevertheless, through their mismanagement and corporate waste, HMI went into a steady decline. Within seven months the new management had run the company into financial ruin, ultimately selling it off at thirty cents a share.

In any event, even though the new managers of HMI were aware that the inventory figures of the company had been inflated for one quarter (the last quarter of 1995), and even though they were able to force Dr. Hotte's resignation as a result, in February of 1996 the last thing that they wanted to do was to issue a devastating press release which might destroy their newly acquired company. So on February 27, 1996 they made the following rather cryptic public statement purportedly designed to disclose the in-transit inventory manipulations:

> . . . [W]hile the Company's financial results for the third quarter ended January 31, 1996 have not yet been finalized, the Company intends to take significant write-offs for accounts receivable and inventory, as well as planned operational consolidations. The Company estimates that the total charges shall be in the range of $15 to $20 million.
>
> **The Company further announced that it has discovered certain accounting irregularities and that it believes that it may have to restate its financial statements for the fourth quarter of the fiscal year ended April 30, 1995** and for the subsequent two fiscal quarters ended July 31, 1995 and October 31, 1995 . . . Based on the preliminary results of the Special Committee's review, which

> has not yet been completed, the Company believes that these matters were limited to periods stated above.

Thus this fraudulent inventory scheme, which the government would later argue somehow caused over 60 million in losses to the HMI shareholders, was described in the February 27th press release merely by the rather obscure reference to certain unidentified "accounting irregularities." The reference in the first paragraph to write downs for "receivables and inventory as well as planned operational consolidations" had nothing to do with the alleged inventory inflation in the 4th quarter of 1995. The "inventory" reference related to new management's decisions to write off certain "inventory" — actually a product line called "Bio-injectors" that HMI had previously purchased and which the new managers elected to abandon. The reference to "receivables" concerned the fact that the new managers had elected to treat any unpaid balance[s] which had been outstanding for a certain period of time as uncollectible losses and were therefore "writing down" certain dated "receivables." The reference to "planned operational consolidations," actually referred to the substantial monies spend by the new management to move the company to Chicago (where several of the new principals lived) and to pay for the new salaries, expenses and stock options they had generously voted for themselves. Given the magnitude of these "receivables and inventory . . . [and] planned operational consolidations" — charges which amounted to $15 to $20 million dollars in a company with a total value of approximately 100 million dollars and which had nothing to do with the alleged fraudulent inventory scheme — the government's argument that the oblique reference in the press release to "certain accounting irregularities" was the single factor, or even one of the more significant factors in the $3.00 drop in the stock price on February 27th, collapses under it own weight.

Against this background, one is able to understand how contrived the methodology created by the government to

measure the "loss" purportedly caused by the Petitioner's conduct was. In creating their loss scenario the prosecutors first selected the date of June 15, 1995, which was the day that HMI issued a press release announcing its 4th quarter earnings figures (which included the inflated inventory figures). They next selected the date of February 27th 1996, which was the date that the press release reproduced above was issued by the new management of HMI. The government then took the average closing price of HMI stock during the 184 day period between those two dates — which was computed by the government to be an average price of $12.21. Next the prosecution took the closing price of HMI stock on February 27th 1996 — the date of the press release — which was said to be $3.25. They then asserted that there were approximately 9,300,000 shares of HMI stock outstanding on February 27th 1996. From this amount they subtracted 1,120,000 shares held by Dr. Hotte — which incidentally, he never sold a single share of — and further subtracted approximately 700,000 additional shares held by the government's immunized witnesses (a substantial portion of which Dr. Hotte's accusers had secretly sold prior to the February 27th press release based upon their insider knowledge that an adverse press release was about to issue). This resulted in the government's figure of 7,480,000 shares. They then multiplied this amount by their purported average trading price of $12.21 and subtracted from that the amount resulting from multiplying this same total number of shares by the closing price on February 27th 1996 of $3.25. Calculating the loss in this manner they claimed that it amounted to $67,020,800 (ie., 7,480,000 shares X $12.21 = $91,330,800; 7,480,000 shares X $3.25 = $24,310,000; $91,330,800 - $24,310,000 = $67,020,800.)

As defense counsel pointed out to the District Court in their pre-sentencing submissions, the reasons why this methodology was entirely flawed were as numerous as they were manifest. First, the government's self-created loss formula entirely ignored the real reasons why the stock dropped $3.25 on the 27th — and

that was the announcement that HMI was going to absorb 15 to 20 million dollars in "write-offs for accounts receivable and inventory, as well as planned operational consolidations." Second, the reason why the government went through this convoluted procedure of claiming that it was somehow necessary to compute the "average loss over this 184 day period," was really because on the morning of February 27th 1996 — and before the press release announcing, *inter alia*, the so-called "accounting irregularities" — HMI stock was trading at $6.00 a share, not $12.21. The prosecution therefore created this spurious "averaging" for the sole purpose of generating a higher number to plug into their "loss" equation.

Next, defense counsel pointed out to the District Court that on cross examination it had been revealed for the first time that prior to February 27th 1996, several of the government's immunized witnesses had been engaged — completely unbeknownst to Dr. Hotte and not alleged to be any part of the conspiracy with which he had been charged — in all sorts of manipulations and misconduct in connection with the stock of HMI. It was revealed, for example, the that the company's Chief Financial Officer had not only been secretly involved in the insider trading of HMI stock for his own benefit, but more importantly, he was suppling insider information to a stock broker with whom he was in league and who had numerous clients in the stock.

As defense counsel pointed out to the District Court at the time of sentencing, the impact of this insider trading was self evident. In one instance, for example, it was confirmed that on February 22nd 1996 (five days before the press release of the 27th) the Chief Financial Officer had secretly disclosed to the broker with whom he was clandestinely working, that material adverse information was about to be publicly announced by the company (ie., the forthcoming press release of the 27th). As the trading records disclosed at trial confirmed, on February 23rd the volume in HMI stock shot-up from its normal trading volume of substantially less than 100,000 shares a day, to almost a

million shares (999,800) a day, with a corresponding dramatic drop in price over the following four day period (from February 23 to the 26th) from $10.87 to $6.00, or almost one half the value of the stock. Dr. Hotte not only had nothing to do with this insider trading, but didn't even find out about it until it was revealed, for the first time, during the cross examination of the government's witness at trial.

Dr. Hotte also found out for the first time at the trial, that another officer of HMI — similarly given complete immunity by the prosecution in the deal brokered by the corporation's newly hired outside counsel — had not only been secretly buying hundreds of thousands of dollars in "put options" on HMI stock in a brokerage account held in his wife's name, but was also "shorting" the stock.

Finally, and perhaps as important as any other factor effecting the loss calculation in this case, defense counsel pointed out to the District Court that in determining actual loss in publicly traded stocks, numerous "market factors" have to be taken into account. To this end, counsel proffered a number of cases and treatises which described in detail the complexities of attempting to fairly determine loss or damages in civil 10b-5 cases. For example, as Judge Brieant of the Southern District of New York had explained in his opinion in *In Re: Executive Telecard, Ltd. Securities Litigation*, 979 F. Supp. 1021, 1025 (S.D.N.Y. 1997):

> In assessing the reliability of the Expert Witness' damages analysis we are mindful of the well-settled general principle that damages in a securities fraud case are measured by the difference between the price at which a stock sold and the price at which the stock would have sold absent the alleged misrepresentations or omissions . . . *(citations omitted)*. We are also guided by the principles associated with the "negative causation" defense under Section 11(e) of the Securities Act of 1933. (Citations omitted) **Those principles — when**

> **applied within the damages valuation context — simply require elimination of that portion of the price decline that is the result of forces unrelated to the wrong.** (Citations omitted) **Such forces can be broadly categorized into: (1) company risk — the unique risk that is peculiar to the particular stock at issue, and (2) market risk — the risk associated with market wide variations generally.** See Brealey & Meyers, Principles of Corporate Finance, (5th ed. 1996) at 173.[4]

However the arguments, case law and treatises proffered by defense counsel notwithstanding, the District Court refused to give any consideration to the volatile market dynamics of the "small cap" market, even though such market dynamics had clearly materially affected the price fluctuations of HMI stock on the NASDAQ exchange. Indeed, to demonstrate just how self-evident these market dynamics were, counsel proved to the District Court that although the stock of HMI had closed on February 27th at $3.25 a share, less than a month later the stock was trading at approximately $6.13 a share, or 13 cents **higher** than it had closed on the day of the February 27th press release.

While it is the duty and obligation of the United States Department of Probation (*see* Rule 32[c] of the Fed. R. Crim. Pro.) to prepare an objective, non-adversarial pre-sentencing report, setting forth the information necessary for the sentencing judge to make informed decisions about the appropriate sentence and any enhancements that may be recommended by the probation officer, as has become the common practice, the probation officer in this case merely served as the government's spokesman. In fact, when defense counsel challenged the conclusions regarding the magnitude and methodology of calculating the "loss" expressed in the PSR, the probation officer

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4. *See also Barrows v. Forest Lab. Inc.*, 742 F.2d 54, 59-60 (2d Cir. 1984); *Estimating Aggregate Damages in Class Action Litigation Under Rule 10b-5 For Purposes Of Settlement*, 59 Fordham L. Rev. 811, 822 (1991).

conceded that he had simply copied the information he had been given by the prosecutors into his report. As the Addendum to the original PSR acknowledged;

> In a letter dated August 26, 1998, Defense Counsel sets forth numerous objections to the pre-sentence report, specifically the factual contents of paragraphs 10, 11, 15 and 16. Since the **information contained in the offense narrative is based upon information obtained from the government, the Probation Department must respectfully defer to the Government's letter dated October 6, 1998, in responding to Defense Counsel's factual disputes.**

Indeed, the PSR was nothing more than a recitation of the government's tortured position as to how the loss should be calculated. In the PSR, the only discussion of the amount of the purported loss caused by the defendant's conduct is set forth below:

> When the truth was revealed, HMI issued a press release in late February [the 27th] of 1996 and disclosed to the public that accounting "irregularities" had occurred at HMI, at which time the price of HMI's stock fell from approximately $11.5 [**which is not true, since the stock had opened at $6.00 on the morning of the 27th*] per share to approximately $3.5 per share, causing HMI's shareholders to lose over $60 million in the value of their investments.
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> * * *
>
> As noted above, the drop in price of HMI's stock resulted in over $60 million in loss to HMI investors. For Guideline purposes, the amount of loss attributable to the defendant is at least $60 million.

Petitioner points these facts out not solely to criticize the lack of independence and objectivity by the Department of Probation, but more significantly, to place into context the following events.

Following defense counsel's detailed criticisms of the PSR, and in particular the detailed criticisms of the methodology for loss calculation which the Department of Probation had copied from the government's submission — albeit at the same time giving its very important imprimatur thereto — the probation officer filed a supplemental report with the Court stating that:

> With respect to the calculation of loss, Defense Counsel argues that the amount of loss associated with the instant offense is impossible to quantify. Therefore, Defense Counsel argues that the loss associated with the offense should be determined solely by the defendant's gain from the fraud. As the Government correctly indicates in its letter, Application note 8 of Guideline 2F1.1, provides that for offenses involving fraud or deceit, the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. In this case the loss was, in fact, reasonably estimated based upon the information obtained from the government. The loss calculation is the difference between the price of HMI stock during the period of the fraud and the price of HMI stock after the fraud was disclosed.

Following the ten minutes of oral argument permitted on these issues, the sentencing court made the following statements;

> The defendant has one method that it urges the court use in determining the loss, the government has another view . . . just hearing arguments today, it is agreed that the loss cannot be determined with precision. I have followed 2(f) (1.1) [sic], note 8, and **I think that is a reasonable way of calculating something that you cannot calculate with any degree of certainty.**

Of course the Court had no independent "reasonable estimate of the loss" of its own, so it simply adopted the government's

numbers. As a result, the Court increased Dr. Hotte's base offense level by 17 points, upon its "estimate" that the loss caused to the HMI stockholders as a result of Dr. Hotte's conduct must have exceeded 60 million dollars.

Although these same facts were proffered to the panel of the Second Circuit Court of Appeals that decided Petitioner's direct appeal, they were untroubled with procedures followed or the conclusions that had been reached below. Authoring the Summary Order denying Petitioner's appeal, Judge Sotomayer noted briefly that:

> With regard to his sentence, Hotte challenges the loss calculation by the district court . . . The Sentencing Guidelines contemplate the calculation of a fraud loss in the manner undertaken by the district court. See U.S. Sentencing Guidelines Manual § 2F1.1 commentary n.9 (1998) ("Loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information."). Accordingly, the district court's loss findings were not erroneous, let alone clearly erroneous.

Petitioner's ensuing application for re-hearing, with a suggestion for re-hearing *en banc*, was denied by the Court of Appeals without opinion.

The present case not only raises the direct issue of whether the procedures followed and adopted by the District Court at Petitioner's sentencing comported with Due Process, but implicate the far broader issues of what standards and requirements are constitutionally mandated in instances in which a defendant's sentence is substantially increased as the result of allegations concerning conduct neither proved nor found by a jury. When must factual allegations that hold the potential for increasing a defendant's sentence twenty fold — as in the case at bar — be found beyond a reasonable doubt by a petit jury. And, even if the allegations are deemed "sentencing factors" to

be resolved by the trial court rather than "elements" to be resolved by a jury, what procedures and standards of proof must be met to insure that evidence of sufficient quality and quantity is adduced to support a finding by a sentencing court that a defendant's sentence should be materially "enhanced."

REASONS FOR GRANTING THE WRIT

It is respectfully asserted that there are compelling reasons for this Court to issue a Writ of Certiorari in the instant case. This Petition raises three interrelated issues. First, when will a "finding of fact" that holds the potential to substantially increase the punishment that a defendant may be subjected to, be deemed to constitute an "element" of the offense which must be found beyond a reasonable doubt by a jury. Second, if the "factual finding" is deemed to be a "sentencing factor" rather than an "element"of the offense, what procedures and standards are nonetheless constitutionally mandated when such a "sentencing factor" can operate to substantially increase a defendant's sentence over the "base" offense level for the crime tried to the petit jury. Finally, in an instance where a factual finding genuinely holds the potential to significantly increase a defendant's sentence — that is to say passes the so-called "tail wagging the dog" threshold — is there a rational basis, and/or a constitutionally permissible basis, to distinguish between the process that must be afforded a defendant regardless of whether the enhancement is deemed to be an "element" or a "sentencing factor."

It is respectfully asserted that the state of the law on these issues is uncertain and that it is critically important for this Court to now step-in to provide the federal judiciary with the necessary guidance to protect defendants' constitutional rights and to bring reasonable uniformity to the construction and application of sentencing enhancing factors.

In a series of recent cases before this Court, there has been substantial litigation over these issues. *See McMillian v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411 (1986); *Witte v.*

United States, 515 U.S. 389, 115 S. Ct. 2199 (1995); *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633 (1997); *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998); *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999).

In resolving each of these cases, the Court repeatedly alluded to the broader constitutional implications that lurked beneath the surface. For example, there is the now famous statement in *McMillan* that — "The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense" (477 U.S. at 88) — which launched hundreds of decisions addressed to what the appropriate burden of proof was in a given sentencing proceeding. These sub-surface constitutional considerations were similarly touched upon by the Court in *Witte*, where Justice O'Conner, delivering the opinion of the Court noted;

> Petitioner does not argue that the range fixed by Congress is so broad, and the enhancing role played by the relevant conduct so significant, that consideration of that conduct in sentencing has become "a tail which wags the dog of the substantive offense." *McMillan, 477 U.S. at 88;* cf. *Mullaney v. Wilbur, 421 U.S. 684, 700, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975).* (515 U.S. at 403)

However, as the lower court decisions considering these issues continued to emerge, more and more Federal Judges began to question whether the preponderance of evidence standard proposed by the Sentencing Commission (see commentary to USSG § 6A1.3[5]) comported with Due Process

5. This portion of the "commentary" to USSG § 6A1.3, regarding the Commission's view of the appropriate evidentiary standard to be applied in sentencing hearings, was added effective November 1, 1991. The only explanation offered by the Commission for the inclusion of this statement was: "This amendment expresses the Commission's approval of the use of a preponderance of the evidence standard in (Cont'd)

and/ or Sixth Amendment guarantees. Nevertheless, lacking the necessary guidance from this Court, *stare decisis* on the proper treatment and resolution of these issues has developed unevenly, and on an *ad hoc* basis. Indeed, in the Court's *per curiam* opinion in *Watts* it observed that:

> We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue. (117 S. Ct. 633, at 637-638)

In March of 1998, the Court issued its opinion in *Almendarez-Torres*. Although primarily addressing the "element" versus "sentencing factor" dichotomy in the context of a recidivism enhancement, the Court appeared to be moving closer to the core issue of whether it was constitutionally dispositive that the legislature had labeled a particular enhancement a "sentencing factor" rather than a "element." The Court appeared to acknowledge in *Almendarez-Torres* that there was a threshold at which constitutionally — and although the bar may be high — a factor which could serve to materially enhance a defendant's sentence would trigger Fifth and/or Sixth Amendment protections, regardless of how the legislature may have labeled such factor and regardless of how the legislature intended the factor to be applied. As the Court wrote in *Almendarez-Torres*:

> At most, petitioner might read all these cases, taken together, for the broad proposition that sometimes the Constitution does require (though sometimes it does not require) the State to treat a sentencing factor as an element. (523 U.S. at 242)

(Cont'd)

resolving disputes regarding application of the guideline to the facts of the case." There is no reference to any body of case law or other authority to support the Commission's "view" on this subject.

* * *

> We mention one final point. Petitioner makes no separate, subsidiary, standard of proof claims with respect to his sentencing, perhaps because he admitted his recidivism at the time he pleaded guilty and would therefore find it difficult to show that the standard of proof could have made a difference to his case. Accordingly, we express no view on whether some heightened standard of proof might apply to sentencing determinations which bear significantly on the severity of sentence. Cf. United States *v.* Watts, 519 U.S. __, __, *136 L. Ed. 2d 554, 1997 U.S. LEXIS 1, 117 S. Ct. 633 and n.2 (1997)* (per curiam) (acknowledging, but not resolving, "divergence of opinion among the Circuits" as to proper standard for determining the existence of "relevant conduct" that would lead to an increase in sentence). (523 U.S. at 247-248)

To date, the last opinion in this line of cases is the Court's March 24th, 1999 decision in *Jones v. United States, supra.* In *Jones* the Court held that;

> The preceding paragraph in the text expresses that principle plainly enough, and we re-state it here: **under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt**. (119 S.Ct at 1224 n.6)

Nevertheless, while the holding of *Jones* seems almost incontestably driven by constitutional considerations — rather than merely being an exercise by the Court to construe the provisions of one particular statute — the decisions that have followed in the lower courts reveal a marked inconsistency in

interpretation and application. Claiming that it is unfounded to read *Jones* as blazing any new constitutional trails, a number of courts have unjustifiably truncated the constitutional implications of *Jones* by asserting that the holding applies only to the federal car-jacking statute (18 U.S.C. § 2119) and should not be read as standing for any broader propositions. As the Court in *United States v. McGuire*, __ F.3d __, 1999 U.S. App. LEXIS 33147 (10th Cir. 1999) held;

> The Supreme Court's decision in Jones, however, does not stand for the incredibly broad proposition that anytime the question of bodily injury to a victim arises in a federal prosecution, even in the application of the Sentencing Guidelines, that question must be submitted to the jury. Instead, the Jones decision is exceedingly narrow. It stands only for the limited proposition that when the government seeks to invoke the heightened penalties set out in §§ 2119(2) and (3), it must charge the aggravating facts of serious bodily injury or death in the indictment, submit the question to the jury, and prove the existence of the aggravating fact, as an element of the crime, beyond a reasonable doubt. Because McGuire was not sentenced pursuant to the heightened penalties set out in § 2119(2), Jones simply has no relevance to this case.

Also see, *United States v. Eads*, 191 F.3d 1206, 1214 (10th Cir. 1999) ["(A) more reasonable reading of Jones, (is) one that anchors its holding to its facts, i.e., the statutory provision involved."]; *United States v. Hester*, __ F.3d __, 2000 U.S. App. LEXIS 144 (11th Cir. 2000).

Other courts have argued that Justice Souter's comments in *Jones*, regarding the constitutional implications that arise when enhancements designed to substantially increase a defendant's sentence are at issue — and specifically the Court's statements in footnote 6 (119 S. Ct at 1224 n.6) — were merely "dicta," breaking no new constitutional ground. As the Court

held in *United States v. Foye*, 68 F. Supp. 2d 730, 732 (S.D. W. Va. 1999);

> In reaching this decision, the Supreme Court stated in dicta the following constitutional principle that previous Supreme Court cases have suggested: "Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 1224 n.6. [the defendant] insists that this dicta reflects the adoption of a new constitutional principle that requires this Court to interpret the amount of drugs under 21 U.S.C. § 841(b) as an element of the offense.
>
> Contrary to [the defendant's] argument, the Jones decision does not require every fact that increases the maximum penalty for a crime to be interpreted as an element of the offense. The Supreme Court in Jones merely recognized a constitutional principle that had only been suggested in its prior decision in McMillan *v.* Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986). The Court specifically stated that its decision in Jones "does not announce any new principle of constitutional law." Jones , 119 S. Ct. at 1228 n.11. The Jones decision therefore does not alter the existing constitutional landscape concerning factors that increase the penalties for an offense.

In *United States v. Jones*, 194 F.3d 1178, 1286 (10th Cir. 2000), the Tenth Circuit expressed its view that "[b]ecause Jones 'suggests' rather than establishes a new principle of constitutional law, 119 S. Ct. at 1224 n.6, we adhere to the doctrine of stare decisis and decline to reexamine whether the

penalty provisions of § 841(b)(1) violate the Fifth and Sixth Amendments." Reaching similar conclusions, the Court in *United States v. Harris*, 66 F. Supp. 2d 1017 (N.D. Iowa 1999) found that *Jones* merely raised the specter of constitutional issues, but never actually formulated any definitive rules or findings;

> Taken as a whole, the majority decision articulates what this court will call the "Jones Principle," that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 119 S. Ct. at 1224 n.6. It did so, however, in the context of statutory interpretation — to attempt to settle uncertainty about the text of the car-jacking statute by avoiding the constitutional doubts it believed might otherwise arise . . . Furthermore, the majority admitted that this principle, however categorically stated, was only "suggested," not "established, "by its prior precedent, so that failure to comply with the principle "rises only to the level of [constitutional] doubt, not certainty." (66 F. Supp.2d at 1023)
>
> * * *
>
> In light of these precedents and the Jones decision itself, this court concludes that the "Jones Principle" is not yet the "Jones Rule." (66 F. Supp.2d at 1034)
>
> * * *
>
> What should this court do in light of Jones when confronted with a case, such as this one, charging a violation of or a conspiracy to violate § 841, in which the quantity of drugs increases the range of sentencing maximums and specifically raises the sentencing minimums? Contrary to the conclusion of some of the decisions of the Fifth Circuit Court of Appeals discussed above, this court concludes that

> Jones does not compel the court to do anything, because Jones does not directly answer the question; Jones only raises a "constitutional doubt" about the answer . . . However attractive the "Jones Principle" may be, it has not yet ripened into the "Jones Rule." (66 F. Supp.2d at 1034)

Accord, United States v. Williams, 194 F.3d 100, 105 (D.C. Cir. 1999) ["We are also reluctant to reexamine our precedent because it is not at all clear whether Jones applies broadly to all criminal statutes or is limited to the unique facts of that case. Jones represents only the latest in a series of seemingly conflicting cases addressing the sentencing factor versus element issue, and its attempt to distinguish, explain, and reconcile earlier cases leaves unresolved several questions that lead us to wonder about the precise scope of its holding."]

Another dynamic that has emerged in a number of cases that have developed along an essentially parallel track to the *McMillian - Jones* series, is that lower courts have sought to avoid the broader constitutional questions by limiting the scope of their inquiry to determining whether the enhancement at issue is fairly found to be more like a traditional sentencing factor or more like a statutory element. Once that rather mechanical determination is made, these courts are content to end their inquiry, as if all constitutional doubt about the adequacy of the process has been resolved. And, if the potential enhancement is deemed to be a sentencing factor, then such courts contend that all that Due Process and/or the Sixth Amendment require is application of the preponderance of the evidence standard by the trial judge. As the D.C. Circuit recently explained its view in *United States v. Williams*, *supra* at 104 (D.C. Cir. 1999);

> Announced in the final days of the Supreme Court's most recent term, Jones considered whether a factor that substantially increases a defendant's sentence under the federal carjacking statute is an element of the offense or a matter to be decided by the district

> court at sentencing. As the Court pointed out, this seemingly semantic distinction has enormous practical significance. "Elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." 119 S. Ct. at 1219. Sentencing factors may be determined by the district court.

Accord, United States v. Jones, __ F.3d __, 1999 U.S. App. LEXIS 26230 (D.C. Cir. 1999) ["Because quantity is not a substantive element of the offense, but is merely a sentencing factor, the Government need only prove the quantity by a preponderance of the Evidence."]; *United States v. Brown*, 74 F. Supp. 2d 44 (D. Maine 1999) ["Therefore, if a fact is an offense element, it must be charged in the indictment and, if the defendant chooses to proceed to trial, it must be proven beyond a reasonable doubt. If, on the other hand, a fact is a mere sentencing consideration, it need not be raised until sentencing and need be proven only by a preponderance of the evidence."]; *United States v. Hester*, __ F.3d __, 2000 U.S. App. LEXIS 144 (11th Cir 1999).

Given the irreconcilable differences in reasoning and application that are revealed in the host of post *Jones* decisions, it is respectfully asserted that this Court should grant certiorari in the instant case to resolve several critically important issues. First, this Court needs to go beyond the language in footnote No. 6 of *Jones* and to provide the lower courts with more definitive guidance as to what are the parameters for determining when a defendant's Fifth Amendment rights to Due Process and/or his Sixth Amendment rights to Notice and a Jury Trial, require an enhancement to be treated as an element. In this context — and once again as the inconsistent nature of the lower court opinions on this issue confirm — the Court further needs to resolve the relative significance of the "sentencing factor" verses "element" determination. Put differently, is the semantic difference in how an enhancement is labeled (either by the legislature or by subsequent judicial determination) —

as the Court in *United States v. Williams*, *supra* at 104, claimed; i.e. that "this seemingly semantic distinction has enormous practical significance. " — dispositive, or is the fundamental determinant the relative magnitude of the potential increase to a defendant's sentence.

Finally, the Court needs to define for the lower courts just what the constitutional standards are and how such standards are to be construed and applied, both with respect to sentencing enhancing elements as well as sentencing enhancing factors. The importance of resolving these issues was underscored by Mr. Justice White in his dissent from the Court's decision not to grant certiorari in *Kinder v. United States*, 504 U.S. 946, 112 S. Ct. 2290 (1992). As Justice White observed;

> The burden of proof at sentencing proceedings is an issue of daily importance to the district courts, with implications for all sentencing findings, whether they be the base offense level, specific offense characteristics, or any adjustments thereto, or even to those facts found to warrant departure altogether. The resolution of disputed matters at sentencing obviously has serious implications for both the defendant and the Government, as it controls the length of sentence actually to be imposed. I would grant certiorari to clarify the applicable standards under the new sentencing regime.

Clearly there is confusion among the lower courts concerning the constitutional significance of differentiating between "elements" and "sentencing factors." For example, the Court in *Vega v. Suthers*, 195 F.3d 573, 582 (10th Cir. 1999) observed;

> This court agrees with respondents that Vega's proposed analytical model constitutes a semantic wordplay which exalts form over substance. Ultimately, it matters not-at-all what terminology Colorado chose to apply to § 18-18-107, be it "sentence enhancement," "crime," or "element," if

that semantic choice has no impact on the procedural protections due a criminal defendant.

There are numerous cases that have held that in the face of a sentencing factor that has the potential to substantially increase a defendant's punishment the standard proscribed by the Sentencing Commission — to wit, a preponderance of the evidence (*see* USSG 6A1.3) — is constitutionally inadequate (most cases relying on *McMillian*). However no consensus has evolved as to how to determine what standard of proof is otherwise constitutionally required. As a result, sentencing continues to proceed on a case-by-case basis, with each defendant's rights depending in the main upon the vicissitudes of individual judicial treatment. A defendant in one federal courtroom, and a similarly charged defendant in the courtroom down the hall or across the country, will be afforded a different depth and range of "process" and constitutional coverage, depending almost entirely on the individual views of the particular judge presiding. Some courts will adhere to the preponderance standard that has traditionally applied and which is set out in the guidelines. Some judges, having constructed their own sentencing equations to determine when a heightened standard of proof must apply, may conclude that "clear and convincing" evidence is necessary to support a particular enhancement. Yet other jurists may require "proof beyond a reasonable doubt" before a sentencing factor may be used to markedly increase a defendant's punishment. *See United States v. Shonubi*, 103 F.3d 1085, 1089-1090 (2d Cir. 1997) ["Thus, though the Sentencing Commission has favored the preponderance-of-the-evidence standard for resolving all disputed fact issues at sentencing, U.S.S.G. § 6A1.3., p.s., comment, we have ruled that a more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will substantially enhance a sentence."]; *United States v. Ayala*, __ F. Supp. 2d. __, 1999 U.S. Dist. LEXIS 11335, *31-*32 (S.D.N.Y. 1999) ["In seeking yet another adjustment on uncharged conduct never considered

by a jury . . . I conclude that the government must prove these charges beyond a reasonable doubt."]; *United States v. Murgas*, 31 F. Supp. 2d 245, 254 (N.D.N.Y. 1998) ["the burden of proof that must apply here is the 'clear and convincing' standard"]; *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) ["The seven level adjustment increased the sentencing range from 24-30 to 63-78 months . . . a potential increase of 48 months satisfies the *Restrepo* extremely disproportionate impact test. Consequently the district court erred in failing to apply the clear and convincing standard."]; *United States v. Kaluna*, 152 F.3d 1069, 1081 (9th Cir. 1998) ["We, along with other circuits, have understood the Court's opinions to say that while that standard (proof by a preponderance) provides an acceptable minimum in most cases, in certain instances the government may have to meet a standard that is even higher."]; *United States v. Restrepo*, 946 F.2d 654, 659 (9th Cir. 1991).(*en banc*); *United States v. Lombard*, 72 F.3d 170, 186-187 (1st Cir. 1995); *United States v. Paster*, 173 F.3d 206, 216 (3rd Cir. 1999) [In the face of a 9 level upward adjustment, the "government concede(ed) that the magnitude of the departure here imposed . . . requires clear and convincing evidence."]; *United States v. Seale*, 20 F.3d 1279, 1288 (3rd Cir. 1994) ["the district court departed seven-fold from the maximum fine dictated by the Guidelines . . . (w)e consider this seven-fold 1.5 million departure from the maximum of the applicable guideline range to be the type of 'extreme context' which requires the district court use a clear and convincing standard of proof when finding supporting facts."]; *United States v. Kikumura*, *supra*, at 1100-1102; *United States v. Townley*, 929 F.2d 365, 369 (8th Cir. 1991).

Moreover, several intermediate issues require clarification by this Court. First, if a finding that serves to materially enhance punishment is a sentencing factor and not an element, does that foreclose a defendant's Sixth Amendment rights to have the matter determined by a jury. Although the Court has generally discussed the process that was traditionally due a defendant at

sentencing[6] — and the rational underlying such process — questions have now arisen as to whether the traditional model is constitutionally viable in the face of mandatory enhancements built into statutes or otherwise required by the sentencing guidelines.

These questions also arise in part, from a juxtaposition of the Court's comments on these issues in *McMillan* and then later in *Jones*. In *McMillan* the Court noted that;

> In light of the foregoing, petitioners' final claim — that the Act denies them their Sixth Amendment right to a trial by jury — merits little discussion. Petitioners again argue that the jury must determine all ultimate facts concerning the offense committed. Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific

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6. As Mr. Justice Stevens fairly noted in his dissenting opinion in *United States v. Watts*, 136 L. Ed. 2d at 566-67,

> The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes. '*Burns v. United States, 501 U.S. 129, 132, 115 L. Ed. 2d 123, 111 S. Ct. 2182 (1991)*. The goals of rehabilitation and fairness served by individualized sentencing that formerly justified vesting judges with virtually unreviewable sentencing discretion have been replaced by the impersonal interest in uniformity and retribution. n1 Strict mandatory rules have dramatically confined the exercise of judgment based on a totality of the circumstances. 'While the products of the Sentencing Commission's labors have been given the modest name "Guidelines," . . . they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed.' *Mistretta v. United States, 488 U.S. 361, 413, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)* (SCALIA, J., dissenting)."

> findings of fact. See *Spaziano v. Florida, 468 U.S., at 459.* (477 U.S. at 93)

However subsequently in *Jones* the Court seemed to suggest that the issue of jury factfinding of sentencing enhancing factors was not necessarily foreclosed — although it is difficult to determine from the opinion whether the Court was saying that anything that substantially effects punishment can serve to transform what might otherwise be viewed as a sentencing factor into an "element," or simply that factfinding by a jury might be required in the extreme cases, even when the enhancement is undisputably a sentencing factor. As the Court stated in *Jones*;

> McMillan is notable not only for acknowledging the question of due process requirements for factfinding that raises a sentencing range, but also for disposing of a claim that the Pennsylvania law violated the Sixth Amendment right to jury trial as well. The petitioner's basic argument was for a right to jury determination of all "ultimate facts concerning the offense committed," *id. at 93,* and although the Court disposed of this by reference back to its due process discussion, that discussion had broached the potential constitutional significance of factfinding that raised the sentencing ceiling. McMillan, then, recognizes a question under both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth: when a jury determination has not been waived, may judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime? The seriousness of the due process issue is evident from Mullaney's insistence that a State cannot manipulate its way out of Winship, and from Patterson's recognition of a limit on state authority to reallocate traditional burdens of proof; the substantiality of the jury claim is evident from the practical implications of

> assuming Sixth Amendment indifference to treating a fact that sets the sentencing range as a sentencing factor, not an element. (119 S. Ct. at 1224)

And of course subsumed within this issue, is the companion question of whether there is any meaningful distinction to be drawn when the enhancing factor is incorporated within the statute under which the defendant was prosecuted, rather than being required to be applied by virtue of the sentencing guidelines.

Finally, there is the question that even if a defendant does not enjoy the right to have the factfinding performed by the petit jury, what constitutional considerations nonetheless determine the standard of proof that must be applied when the factfinding is made by the sentencing court. The Court has touched upon this issue in several of the *McMillian - Jones* series of cases, but once again no definitive parameters have been articulated; *i.e.*, *McMillian*, 477 U.S. at 88, [If the effect of the enhancement in comparison to the base offense for the substantive crime committed would create an instance where the enhancement would operate "to be a tail which wags the dog of the substantive offense."]; In *Almendarez-Torres*, 523 U.S. at 251, Justice Scalia, dissenting, found ["(t)hat it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject, is clear enough from our prior cases resolving questions on the margins of this one."]

In the instant case, Petitioner's sentence was increased from a base offense level of which would have called for a sentencing guideline range of 0 - 6 months to a guideline range of 9 - 11¼ years. Not only did the sentencing court refuse to adopt a higher standard of proof than a mere preponderance of the evidence, but after conceding "that the loss cannot be determined with precision," the District Court even further diluted the standard

of proof by resorting to USSG § 2F1.1 n.9, and finding that "the loss need not be determined with precision . . . [and that] the court need only make a reasonable estimate of the loss, given the available information." When an enhancement holds the potential to increase a defendant's sentence from 6 months to 11¼ years, the constitution must necessarily require more.

It is respectfully asserted that the instant case not only presents the appropriate vehicle for the Court to resolve the self-evident confusion and lack of consensus that presently exists among the federal circuit and district courts regarding the issues discussed above, but that settled principals of due process and fundamental fairness dictate that Petitioner's sentence be vacated.

CONCLUSION

Wherefore, for the foregoing reasons the Petitioner, Dr. Clifford E. Hotte, respectfully prays that this Court grant a Petition of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED, DECIDED AND FILED AUGUST 20, 1999

UNITED STATES OF AMERICA,

Appellee,

v.

CLIFFORD E. HOTTE,

Defendant-Appellant.

98-1684

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * *

August 20, 1999, Decided

* * *

JUDGES: PRESENT: HON. GUIDO CALABRESI, HON. JOSE A. CABRANES, HON. SONIA SOTOMAYOR, Circuit Judges.

OPINION:

* * *

Clifford E. Hotte appeals from a judgment of the United States District Court for the Eastern District of New York

(Johnson, J.) dated November 16, 1998. Following a jury trial, Hotte was convicted of eight counts of wire fraud in violation of *18 U.S.C. § 1343*, four counts of mail fraud in violation of *18 U.S.C. § 1341*, one count of securities fraud in violation of *15 U.S.C. § 78(j)*, and one count of conspiracy to commit mail, wire, and securities fraud in violation of *18 U.S.C. § 371*. He was sentenced to 108 months in prison, three years of supervised release, a $250,000 fine, $9,571,429 in restitution, and a $700 special assessment.

I

Hotte was the President, CEO, and Chairman of the Board of Directors of Health Management, Inc. ("HMI"). HMI is a publicly traded company that provides pharmaceuticals to patients who require long-term drug therapy.

In June 1995, Drew Bergman, the Chief Financial Officer of HMI, reported to Hotte and other HMI officials that the company's after-tax earnings for the 1995 fiscal year would be 54 cents per share, which would fall far short of market expectations. Shortly thereafter, according to the testimony of Bergman and other company officials, Hotte held a meeting at which it was agreed to inflate the company's 1995 earnings artificially by pretending that two large shipments of inventory were in transit at the end of the fiscal year and had therefore erroneously not been counted by HMI's outside auditors.

Bergman and Hotte then began to recruit other HMI employees to pull off the false inventory scheme. Among

these recruits was Larry Pedone, HMI's New York warehouse manager. Pedone was instructed to say that he had driven a van full of drugs from New York to Pittsburgh at the end of April — the end of HMI's fiscal year. Other HMI employees facilitated the plan by creating false documents involving these drug shipments.

Through its fraud, HMI created $1.8 million in fictitious inventory, added $225,000 of phantom "inventory-on-consignment," and inflated its sales by $1 million. As a result, when HMI reported its annual earnings to the Securities and Exchange Commission ("SEC"), the company's after-tax profits came out to 74 cents per share rather than 54 cents per share. Hotte signed the SEC filing and asserted that the earnings report was accurate.

Following this earnings statement, Bergman and Hotte continued to overstate inventories in subsequent quarters, but by a smaller amount in each quarter, so that they could conceal their prior fraud from HMI's auditors. In addition, Hotte and the company officers continued to inflate earnings in the second quarter of fiscal year 1996, albeit by engaging in the apparently legal, though misleading, practice of "forward-filling" (i.e., recording expected orders under the current quarter rather than under the subsequent one).

In late 1995, Paul Jurewicz replaced Bergman as Chief Financial Officer. Jurewicz soon learned that there were problems with HMI's inventory figures and informed Hotte, but Hotte refused to notify the Board of Directors or HMI's counsel about the alleged inventory fraud. Eventually, however, Jurewicz told the company counsel of the problem,

and a company investigation headed by David Stetler — a former federal prosecutor — followed. Hotte went to considerable efforts to urge the participants in the fraud to lie to Stetler's investigators. Hotte himself told Stetler's team that the fictitious inventory shipments at the end of the 1995 fiscal year had, in fact, occurred.

Nonetheless, in early 1996 the fraudulent inventory scheme was discovered by the Stetler investigation. Upon disclosure of the fraud, HMI's stock price plummeted from approximately $12 per share to $3.25 per share. Shortly thereafter, Hotte was removed as the head of HMI.

At trial, Hotte conceded that a fraudulent inventory scheme had been carried out to inflate HMI's earnings. He maintained, however, that he knew nothing about this effort and that HMI officials such as Bergman who were testifying to the contrary were lying in exchange for immunity from prosecution. At Hotte's first trial, the jury deadlocked on all counts.

During the charging conference following the first trial, the government stated, for the first time, that Pedone had given grand jury testimony exculpating Hotte. At the beginning of the second trial, the district court ordered the government to turn over all Brady material. Throughout the course of the second trial, however, Hotte neither requested a transcript of Pedone's testimony nor sought to call Pedone as a witness.

In the second trial, Hotte attacked the credibility of the government's witnesses. In response, the government called

Stetler to testify and corroborate the statements made to him by many of these witnesses during his independent investigation.

Hotte was convicted. At sentencing, the district court calculated the extent of Hotte's fraud by multiplying the total number of HMI's common shares owned by innocent investors (i.e., excluding those owned by the corporate insiders involved in the fraud), which was 7,480,000 shares, by the drop in HMI's stock price, as measured by the difference between HMI's average stock price during the life of the fraud scheme ($12.21 per share) and the price after the fraud's disclosure ($3.25 per share). The total shareholder loss came out to approximately $67 million, and Hotte's base offense level was enhanced accordingly.

Hotte now appeals.

II

Hotte's first contention is that the government failed to meet its obligations under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, by not turning over a transcript of Pedone's testimony. We disagree. The fact that the government's failure to turn over Pedone's testimony at the beginning of the first trial is not before us on this appeal, since Hotte's first trial ended in a hung jury. As to the second trial, Brady material is not deemed suppressed when defense counsel knew or ought to have known about exculpatory documents and did not obtain them due to a lack of due diligence. See, e.g., *United States v. Bermudez, 526 F.2d 89, 100 (2d Cir. 1975)*.

Appendix A

In the case before us, Hotte was clearly informed at the charging conference during the first trial that Pedone had provided exculpatory testimony about Hotte before the grand jury. Nevertheless, Hotte took no reasonable steps to obtain Pedone's testimony. Hotte's assertion that his defense counsel did not fully understand the import of the government's statements about Pedone's grand jury appearance is not a valid excuse. Nor does the district court's order that all Brady material be turned over supersede Hotte's responsibility to exercise due diligence in obtaining exculpatory evidence of which he was or should have been aware. Under the circumstances, we conclude that the Brady claim is meritless.

Hotte's second contention is that the district court erred by admitting evidence concerning HMI's "forward-filling" practices. We review the admission of evidence by a district court for abuse of discretion. See *United States v. Rosa, 11 F.3d 315, 333-34 (2d Cir. 1993)*. The presentation of such "bad act" evidence, Hotte argues, impugned his character in violation of Fed. R. Evid. 404(b). But the forward-filling evidence was introduced not to attack Hotte's character, but to illuminate the continuing effort by HMI officials, including Hotte, to manipulate the company's profits and to deceive stockholders. Accordingly, the district court was well within its discretion to admit this evidence.

Next, Hotte contends that the district court was wrong in allowing the government to present Stetler's testimony concerning prior consistent statements made by other witnesses. This claim is meritless. Hotte directly challenged the credibility of the testimony of HMI officials who

implicated him at trial in the fraud scheme. Hotte maintained at trial that the testimony of the HMI's witnesses who implicated him was influenced by their cooperation agreements with the government. The introduction of these witnesses' prior consistent statements to Stetler — statements which pre-dated the government's criminal investigation — squarely rebutted Hotte's accusations and was therefore permissible. See Fed. R. Evid. 801(d)(1)(B); *Tome v. United States, 513 U.S. 150, 158, 130 L. Ed. 2d 574, 115 S. Ct. 696 (1995).*

Hotte's remaining challenges to his conviction are wholly without merit. First, even though the specific loss figure of $60 million was not a part of the trial record, the loss of multi-millions of dollars could reasonably be inferred from the evidence and the government could properly refer to the substantial loss during summation. Moreover, in light of the overwhelming evidence of Hotte's guilt, any error in the prosecutor's summation could only be harmless. Second, Hotte argues that the government violated the federal anti-gratuity statute, *18 U.S.C. § 201(c)*, by obtaining the testimony of HMI officials in exchange for non-prosecution agreements. See *United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998)*, rev'd en banc, *165 F.3d 1297* (10th Cir.), cert. denied, *119 S. Ct. 2371 (1999)*. But there is no merit to this argument either. We recently held that the anti-gratuity statute does not apply to the United States or to any Assistant United Stated States Attorney acting in his or her official capacity. See *United States v. Stephenson, __ F.3d __, 1999 U.S. App. LEXIS 14783, 1999 WL 437082*, at *7 (2d Cir. June 30, 1999).

Appendix A

With regard to his sentence, Hotte challenges the loss calculation by the district court. We review the factual findings of a district court at sentencing for clear error. See *United States v. Johnson, 994 F.2d 980, 988 (2d Cir. 1993)*. Hotte's argument that the loss from the fraud is impossible to quantify is without merit. The Sentencing Guidelines contemplate the calculation of a fraud loss in the manner undertaken by the district court. See U.S. Sentencing Guidelines Manual § 2F1.1 commentary n.9 (1998) ("[L]oss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information."). Accordingly, the district court's loss findings were not erroneous, let alone clearly erroneous.

We have considered all of Hotte's arguments and find them to be without merit. The judgment of the district court is therefore affirmed.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of August, one thousand nine hundred and ninety-nine.

PRESENT:

HON. GUIDO CALABRESI,
HON, JOSÉ A. CABRANES,
HON. SONIA SOTOMAYOR,
Circuit Judges.

#98-1684

UNITED STATES OF AMERICA,

Appellee,

v.

CLIFFORD E. HOTTE,

Defendant-Appellant.

SUMMARY ORDER

Appendix A

* * *

Appeal from the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

ISSUED AS MANDATE: 11/12/99

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 16, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CASE NUMBER: 97 CR 0669(SJ)

UNITED STATES OF AMERICA

V.

CLIFFORD HOTTE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

James LaRossa, Esq. 41 Madison Avenue, NY, NY 10010
Defendant's Attorney

THE DEFENDANT

* * *

☑ was found guilty on count(s) one through fourteen of the superseding indictment after a plea of not guilty.

Appendix B

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Number(s)**
18 USC 371	Conspiracy to Commit mail, Wire, & Securities Fraud	03/98	a1
18 USC 78(j)	Securities Fraud	03/98	a2
18 USC 1341	Mail Fraud	03/98	a3-a6
18 USC 1343	Wire Fraud	03/98	a7-a14

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

☒ All open counts are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: 102-35-2083	November 16, 1998 Date of Imposition of Judgment
Defendant's Date of Birth: 05/21/47	s/ Sterling Johnson, Jr. Signature of Judicial Officer
Defendant's USM No.: 48653-053	STERLING JOHNSON, JR., U.S.D.J. Name & Title of Judicial
Defendant's Residence Address: 51 Prospect Road Canterport, New York 11721	Officer November 16, 1998 Date

* * *

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months on count 2 and forty eight (48) months on counts 1, 3-14 of the superseding indictment. Terms of imprisonment imposed on count 2 to run consecutive to the concurrent terms of imprisonment imposed on counts 1, 3-14 for a total of one hundred and eight (108) months imprisonment.

* * *

☑ Defendant to remain on bail pending appeal.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 5, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of November one thousand nine hundred and ninety-nine.

Dkt No: 98-1684

USA

v

Hotte

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant CLIFFORD E. HOTTE.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

* * *

Appendix D

STOCK FRAUD STATUTE
15 U.S.C. § 78j

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

Appendix D

MAIL FRAUD STATUTE
18 U.S.C. § 1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, place, in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

* * *

Appendix D

WIRE FRAUD STATUTE
18 U.S.C. § 1343

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

* * *

RELEVANT UNITED STATES SENTENCING GUIDELINES APPLICATION NOTES AND COMMENTARY

U.S.S.G. §2F1.1 Fraud and Deceit, Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15
(Q) More than $20,000,000	add 16
(R) More than $40,000,000	add 17
(S) More than $80,000,000	add 18

* * *

APPLICATION NOTE 9 TO U.S.S.G. § 2F1.1

9. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available

information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.

* * *

COMMENTARY TO U.S.S.G. §6A1.3

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. *Lee*, 18 U.S.C. § 3661; see also *United States v. Watts*, 117 S. Ct. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may, be the subject of a subsequent prosecution); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. *Watts*, 117 S. Ct. at 637; *Nichols*, 511 U.S. at 748; *United States v. Zulta-Alvarez*, 922 F.2d 33 (1st Cir. 1990), *cert. denied*, 500 U.S. 927 (1991); *United States v. Beaulieu*, 893 F.2d 11, 77 (10th Cir.), *cert. denied*, 497 U.S. 1038

(1990). Reliable hearsay evidence maybe considered. *United States v. Petty*, 982 F.2d 1365 (9th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994); *United States v. Sciarrino*, 884 F.2d 95 (3d Cir.), *cert. denied*, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informants identity and there is sufficient corroboration by other means. *United States v. Rogers*, 1 F.3d 341 (5th Cir. 1993); see also *United States v. Young*, 981 F.2d 80 (5th Cir.), *cert. denied*, 508 U.S. 980 (1993); *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978), *cert. denied*, 444 US. 1073 (1980). Unreliable allegations shall not be considered. *United States v. Ortiz*, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

* * * *